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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1310

THE BOARD OF SCHOOL COMMISSIONERS
OF THE CITY OF INDIANAPOLIS, et al.,
Petitioners,

vs.

[redacted]
BARBARA GARDNER, et al.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

Table of Cases and Statutes ii

Opinions Below 1

Jurisdiction 2

Question Presented for Review 3

Constitutional and Statutory Provisions Involved 4

Statement of the Case 4

Reasons for Granting the Writ 7

Conclusion 12

Appendix A: Opinion of the District Court A1

Appendix B: Order of the District Court A6

Appendix C: Order of the Court of Appeals A8

Appendix D: Order of the Court of Appeals A14

Appendix E: Order of the Court of Appeals A15

Appendix F: Order Allowing Attorney's Fees A16

Appendix G: Order of Clarification A17

Appendix H: 20 U.S.C. Section 1617 ..... A18

TABLE OF CASES AND STATUTES

CASES

Givens v. W. T. Grant Co., 457 F.2d 612 (2 C.A. 1972).. 9

Johnson v. Combs, 471 F.2d 84 (5 C.A. 1972) 10, 11

Jones v. Seldon's Warehouse, Inc., 357 F. Supp. 886 (1973) 9

Northcross v. Board of Education, 37 L.Ed.2d, 93 S.Ct. — (1973) 7, 8

STATUTES

20 U.S.C. Section 1617 .....2, 3, 4, 6, 7, 8, 9, 10, 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. _____

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA AND BARBARA GARDNER, et al.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered in this matter on November 28, 1973.

OPINIONS BELOW

The August 18, 1971, opinion of the United States District Court for the Southern District of Indiana is reported at 332 F.Supp. 655. That decision was affirmed on appeal by the United States Court of Appeals for the Seventh Circuit, which decision is reported at 474 F.2d 81 (7th

Cir. 1973). A Petition for Certiorari was denied by this Court, which denial is reported at 37 L.Ed.2d 1041 (1973). None of these opinions have been reprinted in the Appendix for the reason that they involved issues which are totally unrelated to the issue presented in this Petition. Moreover, the Respondents, Barbara Gardner, et al., were not parties to any of the prior litigation in this case. The unreported opinion of the United States District Court for the Southern District of Indiana, entered September 28, 1972, *nunc pro tunc* to September 15, 1972, is reprinted as Appendix A to this Petition. The Order of the United States District Court for the Southern District of Indiana, entered September 28, 1972, *nunc pro tunc* to September 15, 1972, is reprinted as Appendix B to this Petition. The unreported opinion of the United States Court of Appeals for the Seventh Circuit, affirming the District Court's decision, is reprinted as Appendix C to this Petition. The September 24, 1973, Order of the United States Court of Appeals for the Seventh Circuit is reprinted as Appendix D to this Petition. The November 8, 1973, Order of the United States Court of Appeals for the Seventh Circuit is reprinted as Appendix E to this Petition. The November 28, 1973, Order of the United States Court of Appeals for the Seventh Circuit, wherein attorneys' fees were granted to the counsel for Respondents, Barbara Gardner, et al., is reprinted as Appendix F to this Petition. The December 10, 1973, Order of the United States Court of Appeals for the Seventh Circuit, clarifying the November 28, 1973 Order, is reprinted as Appendix G to this Petition.

JURISDICTION

The Board of School Commissioners of the City of Indianapolis, Indiana, Erle A. Kightlinger, Jessie Jacobs, Carl Meyer, Paul E. Lewis, Lester E. Neal, Constance R. Valdez, W. Fred Ratcliff, members of the Board of School Com-

missioners of the City of Indianapolis, and Karl R. Kalp, as Superintendent of Schools, are petitioners herein. Barbara Gardner, for herself and for her next friends, Sheryl and Tamara Gardner, Sharon, Shawn, and George Hendricks, and Farah Davidson, Melinda Smith, for herself and for her next friends, Edith, April, James and Robert Torrence, and Josephine Taylor, for herself and for her next friends, Regina, Kevin, Timmy, Martha, Vickie and Iris Taylor, are the respondents herein, who were represented by Legal Services Organization of Indianapolis, Inc. in the proceedings below. The United States of America is also a named respondent herein, but it would appear that it has no interest in the issue before this Court.

The Order of the Court of Appeals was entered on November 28, 1973. The Petition for Certiorari was filed less than 90 days from the date of the Order of the Court of Appeals. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Did the Court of Appeals err in taxing attorneys' fees as costs against a public school corporation pursuant to Section 718 of the Emergency School Aid Act of 1972, 20 U.S.C. Section 1617, where the prevailing plaintiffs incurred no legal expenses for the legal services performed on their behalf for the reason that the services were provided free of charge by Legal Services Organization of Indianapolis, Inc. which organization, similar to the defendant school corporation, is funded almost entirely with public funds?

2. Does Section 718 of the Emergency School Aid Act of 1972, 20 U.S.C. Section 1617, require the presentation of some evidence and a finding by the trial court that "the proceedings were necessary to bring about compliance" before a court of the United States can properly tax at-

torney fees as costs against a defendant pursuant to the statute?

STATUTORY PROVISIONS INVOLVED

This case involves Section 718 of the Emergency School Aid Act of 1972, 20 U.S.C. Section 1617. This statute has been reprinted in Appendix H herein.

STATEMENT OF THE CASE

The jurisdiction of the United States District Court was initially invoked pursuant to 42 U.S.C. Section 2000C-6(a) and (b), and 28 U.S.C. Section 1345. The Respondents, the intervening plaintiffs Gardner, et al., were permitted by the District Court to intervene in this cause and to file a new complaint at a time when the original case was pending appeal in the United States Court of Appeals for the Seventh Circuit.

This litigation began on May 31, 1968, when the United States of America filed a school desegration action in the United States District Court for the Southern District of Indiana, the Honorable S. Hugh Dillin, Presiding Judge. The defendants in said cause were the Board of School Commissioners of the City of Indianapolis, Indiana, and its individual members (hereinafter sometimes referred to as the Board). On August 18, 1971, the trial judge filed its Memorandum of Decision in favor of the United States and directed certain interim orders against the Board. That opinion is reported at 332 F. Supp. 655 (1971). The judgment of the District Court was affirmed by the United States Court of Appeals for the Seventh Circuit on February 1, 1973, which decision is reported at 474 F.2d 81 (1973). The Board's petition for Certiorari was denied by this Court on June 25, 1973, which denial is reported at 37 L.Ed. 2d 1041 (1973).

The Gardner Plaintiffs and Legal Services Organization

On September 7, 1972, while the appeal was pending in the Court of Appeals, the Respondents (hereinafter sometimes referred to as the Gardner plaintiffs) filed a motion to intervene and a new complaint in the District Court. The complaint alleged that the Board had violated the District Court's Order of August 18, 1971, by promulgating a Board Resolution which altered the attendance zones for two schools located within the school city of Indianapolis and which also altered the grade structure at one of the schools in question. The issues formed by the Gardner plaintiffs' complaint were tried before the District Court on September 13, 1972, said trial concluding on September 15, 1972. On September 28, 1972, the District Court entered its Memorandum of Decision *nunc pro tunc* to September 15, 1972. App. p. A1[1]. The District Court found for the Gardner plaintiffs, holding that the Board had committed an act of *de jure* segregation in passing the Resolution in question. *At no time while this cause was pending in the District Court did the Gardner plaintiffs seek an allowance for attorney fees.*

The Gardner plaintiffs were represented by Legal Services Organization of Indianapolis, Inc. (hereinafter L.S.O.). L.S.O. was organized as a non-profit corporation under the laws of the State of Indiana for the purpose of performing free legal services for the poor. L.S.O.'s operations are funded primarily from three sources: (1) the Office of Economic Opportunity in Washington, D. C., (2) the Community Services Program of the City-County Council of Indianapolis, and (3) the Indiana Criminal Justice Planning Agency. The salaries of the attorneys employed by L.S.O., including the attorneys in the present case, are paid from these funds. The basic standard for eligibility for

[1] Citations to the Appendix will be given as "App. p. —."

L.S.O. services is the inability of the applicant to pay a reasonable fee for a lawyer's services. When an applicant is found to be eligible, he is not charged for the services provided him. *The Eligibility Rules of L.S.O. prohibit the acceptance of cases where an attorney's fee is provided by statute.*

The Petitioners appealed the trial court's decision to the United States Court of Appeals for the Seventh Circuit, and on August 10, 1973, the decision of the District Court was affirmed. App. p. A8. As of that date, the Gardner plaintiffs had not sought attorneys' fees. It was not until September 4, 1973, some twenty-five days after the decision of the Court of Appeals, and some 11 days after the time allowed under Rule 39(c) of the Federal Rules of Appellate Procedure, that the Gardner plaintiffs filed a motion in the Court of Appeals seeking leave of the court to file an affidavit of costs including attorneys' fees. The allowance sought related only to the legal services performed on appeal; no fee was sought for the services rendered in the trial court. The Board opposed this motion, and requested oral argument on the issues involved.

By order dated September 24, 1973, the Court of Appeals directed both parties to file simultaneous briefs on the issue as to whether the following words, "upon the entry of a final order by a court of the United States . . .," contained in 20 U.S.C. Section 1617 pertain to a federal court in an appellate proceeding, or such court in a trial proceeding. The Board's request for oral argument was denied. (Docket No. 72-1948, C.A. 7, Order dated September 24, 1973, App. p. A14) After said briefs had been filed, the Court of Appeals granted the Gardner plaintiffs' motion for leave to file an affidavit for costs including attorneys' fees. (Docket No. 72-1948, C.A. 7, Order dated November 8, 1973, App. p. A15.) Thereafter, the affidavit was filed as directed, and

on November 28, 1973, the Court of Appeals awarded $2,500 as attorneys' fees to be paid directly to the attorneys employed by L.S.O. with instructions to them to reimburse the account of L.S.O. (Docket No. 72-1948, C.A. 7, Order dated November 28, 1973, as modified by Order of December 10, 1973, App. pp. A16-17.) The Board opposed and/or responded to every motion or affidavit filed in the Court of Appeals by the Gardner plaintiffs.

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted Because The Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

In *Northcross v. Board of Education*, — U .S. —, 37 L.Ed. 2d 48, 93 S.Ct. — (1973), this Court, in a *per curiam* opinion, Mr. Justice Marshall not participating, set forth the standard or rule which should be applied by a court when determining whether to tax attorney's fees as costs in favor of a successful plaintiff pursuant to Section 718 of the Emergency School Aid Act of 1972, 20 U.S.C. 1617. This Court concluded:

> "... that if other requirements of Section 718 are satisfied, the successful plaintiff 'should ordinarily recover an attorney's fee *unless special circumstances would render such an award unjust.*' " (Our emphasis) 37 L.Ed. 2d at 51.

Petitioners respectfully submit that the Court of Appeals either failed to apply the rule enunciated in *Northcross, supra*, or, if the rule was applied, the Court erred by failing to find that special circumstances exist which render the award of attorneys' fees to L.S.O. unjust. Due to the fact

that the Court declined to make any findings or give any reasons to justify its action, it is impossible to ascertain what rule was applied by the Court in determining that an award was proper under the statute.

It is Petitioners' contention that Congress, in enacting 20 U.S.C. Section 1617 (hereinafter Section 718), never intended that a defendant public school corporation should be required to pay attorney's fees for legal services performed by organizations such as L.S.O., which organization was specifically formed and publicly funded to provide free legal assistance to the poor. An award to L.S.O. fails to serve any recognized purpose underlying the enactment of this statute. One purpose recognized in *Northcross* was "to encourage individuals injured by racial discrimination to seek judicial relief." 37 L.Ed. 2d at 51. Here, no such encouragement was necessary. The opportunity to receive free services from L.S.O. *without regard to any consideration of success* is certainly more encouraging than the benefits of Section 718, which allows fees only to the successful plaintiff.

The only other purpose of such an award would be its penalizing effect. However, in the instant case both the Indianapolis Public Schools and L.S.O. are funded almost entirely with public funds. Legislative bodies, such as Congress, the Indiana General Assembly and local councils in the City of Indianapolis appropriate funds deemed sufficient to finance the desired level of operations and activities which are to be conducted by the public schools and L.S.O. No meaningful penalty is imposed by requiring a public school corporation to pay part of its appropriated funds to another corporation funded with public funds when such requirement arises merely because L.S.O. rendered the very services which it was specifically organized and funded to perform. It is for this reason, no doubt, that

the statute expressly prohibits such an award in cases where the United States is the successful plaintiff.

Indeed, if a "penalty" was actually intended it will be in the form of a reduction in the funds deemed necessary by the people of Indianapolis to operate the public schools. This reduction will either necessitate higher taxes to compensate for the reduction, or it will require the restriction of planned expenditures in other areas, thus lowering the quality of the education offered. Here, the Gardner plaintiffs are residents of Indianapolis and they also receive the educational benefits offered by the public schools; thus, regardless of the action taken to compensate for the reduction, the penalty imposed will fall upon the Gardner plaintiffs. Such a result could not have been the intent of Congress.

The Order of the Court of Appeals is also significant when one considers that it has established a means by which L.S.O. may enter into direct competition with the private bar. Previously, the existence of organizations such as L.S.O. was justified for the reason that it was presumed they would not accept fee generating cases. After the court's order, it would appear that if L.S.O. can receive an award pursuant to Section 718, it can probably receive an award under *any statute* authorizing a fee. Federal courts are divided as to whether organizations such as L.S.O. should be allowed to receive attorney's fees. See, for example, *Jones v. Seldon's Warehouse, Inc.*, 357 F. Supp. 886 (1973), (permitting an allowance) and *Givens v. W. T. Grant Co.*, 457 F.2d 612 (2d Cir. 1972), (disallowing an award). In a Memorandum filed in the Court of Appeals, in an attempt to support their argument that the award will benefit the poor, counsel for L.S.O. asserted that an award of fees pursuant to Section 718 may permit L.S.O. to allocate *more time to such cases.* Accordingly, however, this would mean

that less time would be allocated to cases which are not fee-generating in nature. Thus, if Section 718 is construed to permit an allowance to organizations such as L.S.O., its ultimate effect may be to *deprive* poor people of free legal services unless they seek services for which attorney's fees are provided by statute. And, in any event, the simple result is that L.S.O., which is funded with money from federal, state and local levels, has now been encouraged to operate in direct competition with private enterprise, i.e., the private bar.

Petitioners submit that the Order of the Court of Appeals—issued without a hearing or finding at any level of the proceeding—fails to serve the intent of Congress, operates to permit interference with legislative appropriations for the benefit of no one and it provides a mechanism by which a publicly funded corporation can compete directly with private enterprise. For these reasons, Petitioners request this Court to grant Certiorari and review the Order of the Court of Appeals.

II.

The Procedure Employed by the Court of Appeals in Issuing its Order Conflicts with The Decision of Another Court of Appeals on this Same Matter.

In *Johnson v. Combs*, 471 F.2d 84 (5 C.A. 1972), the Court of Appeals for the Fifth Circuit stated:

> "Section 718 requires a threshhold finding by the trial court that the proceedings were necessary to enforce compliance." 471 F.2d at 86, f.n. 2.

As stated before, the only services for which fees were sought were for the services performed by L.S.O. on appeal. For that reason, there was no hearing on this matter in the trial court, and there was no evidence admitted at trial as

to whether an award was proper under the facts of this case. To be sure, facts not in evidence were referred to in written motions on appeal, but due to the summary nature in which Respondents' motions were granted, Petitioners are unable to ascertain whether the Court of Appeals correctly considered these facts.

Petitioners contend that explicit in the *Johnson* decision is that a court should be required to state its findings or reasoning in an order allowing attorney's fees pursuant to Section 718. In the instant case, there has been no such finding at any level of the proceedings. Therefore, from a procedural standpoint, the Court's order conflicts with the decision of the Court of Appeals for the Fifth Circuit in *Johnson, supra,* for the reason that no findings have been made as required by the statute.

For the reasons before stated, Petitioners contend that this procedural conflict should be reviewed and settled by this Court.

CONCLUSION

Wherefore, Petitioners respectfully pray that a Writ of Certiorari be granted.

Respectfully submitted,

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